

1944.

File No. Cr. A. 1.



Legal DEPARTMENT
A BRANCH

*Examined
2/2/44*

Subject: Criminal Appeals
in the High Court, B'boy
Against the order of Acquittal
from Belgium with
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quality - Destroyed."
K. J. Kelanhar
Superintendent,
D Branch, Legal Department.

P. 13 (E)

File No.

Cr. A. Bel. / 44.

Std. Book-51p 24-3

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Judgment recorded by the High Court in Criminal Nos. 452 and 453 of 1943 (By the Government of Bombay).

The Advocate General with the Government Pleader for the Government of Bombay.

Counsel Mr. M.C. Setalwad with Messrs R.A. Jahagirdar, B.D. Belvi H.F.L. Reddi and A.A. Mandge for the accused.

Coram:- Macklin and J.J.:-

21st February 1944.

Oral Judgment per Macklin J:- These two appeals arise out of the acquittal by a Jury of Belgaum of two persons tried at separate trials for the breach of an order purporting to have been passed under rule 26(5B)(b) of the Defence of India Rules by the District Magistrate of Belgaum. The order in respect of which the trials have been held was dated the 6th September 1942, and in each case the order directed the accused to present himself before the District Superintendent of Police by a certain date on the 15th August 1942 rule 26(5B) had been amended so as to include a provision for an order being issued against a person whose detention had already been ordered to present himself before some named person on penalty of seven years' rigorous imprisonment for breach of the order. The powers of the Government of Bombay under rule 26 were delegated to all District Magistrates by the Government of Bombay on the 19th December 1941, and by virtue of that order of delegation the District Magistrate acting under rule 26(1) had passed an order⁴ of detention against both these accused persons.

It is to be noted that at the time of the delegation of the powers of Government to District Magistrates under rule 26 rule 26(5B) did not stand in its present form. It included no rule in terms giving power to order any person to appear

before a named person and still less did it include any penalty for the breach of such an order. But in passing orders against these two persons to present themselves before the District -- Superintendent of Police the District Magistrate on the 6th -- September 1942 purported to act under sub-rule (5B)(b), which in fact had not in terms been delegated to him and was enacted only on the 15th August 1942. The learned Sessions Judge of Belgaum therefore directed the Jury that the District Magistrate had no jurisdiction by virtue of the powers delegated to him to pass the order of the 6th September 1942 for the breach of which the accused were being prosecuted and he directed the jury to return a verdict of acquittal, which the Jury accordingly did. At the same time he directed the jury that, by reason of the procedure prescribed by rule 119 for bringing orders against individuals to the notice of the individuals affected by the orders, it

could not be said that the two persons against whom the orders were passed had ever had notice of the orders and that there was in these cases no evidence from any other source that they had in fact knowledge of the orders. On that ground also he directed the Jury to return a verdict of acquittal. In these appeals the only question in issue is the legality of these two directions.

The form of the argument on behalf of the accused which found favour with the learned Sessions Judge was that, although it is a recognised principle of law that an authority given by a statute to do certain things authorises the doing not only of all things absolutely necessary for its execution but of all things reasonably necessary, still in the present case it could not be held that the order of the 6th September 1942 directing these persons to appear before the District -- ~~Superintendent~~ Superintendent of Police was an indispensable incident of the order that they should be detained, which order was outstanding

aga-inst them and they were believed to have evaded. On behalf of the Crown the learned Advocate General has repeated to us the view taken by the prosecution before the learned Sessions Judge that the order of the 6th September 1942 was in fact incidental and a necessary incident of the power of the District Magistrate to order detention. If a District Magistrate is given power to order detention we are not disposed to disagree that he must also have power to enforce his order, and a supplementary order -- directing the person concerned to present himself before the District Superintendent of Police would no doubt be an ordinary incident of the power to detain. But the difficulty in accepting the argument as a justification for setting aside the order of acquittal in these cases is that the District Magistrate has not purported in terms to be acting by way of enforcement of the order of detention. What his order shows is that it is passed under rule 26(5B)(b), which carries with it a certain specified penalty for breach, and it is for the breach of that specific order -- passed in terms under rule 26(5B)(b) that the accused were being tried and the charge made it clear that they were being tried for the commission of an offence under that particular rule 26(5B)(b). It follows that unless the District Magistrate had power to issue an order under rule 26(5B)(b), carrying with it the specified -- penalty for breach of the rule, the trial under that rule would be an illegality.

Before us however an argument was raised that was not raised before the learned Sessions Judge. We are told by the learned Advocate General that the power of the District Magistrate to pass orders under rule 26(5B)(b), though ^{as} powers under sub-rule (5B)(b) were not in terms delegated to him at the date of the order of delegation, rests upon section 8(1) of the General --- Clauses Act read with rule 3 of the Defence of India Rules. Rule

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Rule 3 of the Defence of India Rules says that the General Clauses Act shall apply to the interpretation of the Defence of India Rules as it applies to the interpretation of a Central Act. Section 8(1) of the General Clauses Act is this:

Where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former -- enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a -- different intention appears, be construed as references to the provision so re-enacted."

The argument is that by reason of rule 3 of the Defence of India Rules section 8(1) may be read as providing for a case where any one of the Defence of India Rules repeals and re-enacts with or without modification any provision of the defence of India Rules so that a reference in an order passed under the Rules to the unrepealed rule must be construed as a reference to the reenacted rule.

This argument is attacked on behalf of the accused in -- several ways. It is contended in the first place that rule 3 is ultra vires of the Government of India inasmuch as it falls neither under sub-section (1) nor under any of the detailed provisions of sub-sec. 2 of section 1 of the Defence of India Act, the section which gives power to make rules. It is argued that the rule-making power must be strictly construed, so that the General Clauses Act cannot be -- applied to the interpretation of the Rules, unless that course is -- specifically authorised by section 2 of the Defence of India Act. But we are not prepared to accept this contention. It is true that there is no item falling within sec.2(2) which covers rule 3; but sec.2(1) is in general terms and is in no way limited by the details given under section 2(2), which begins with the words "without prejudice to the generality of the powers conferred by sub-section (1)". Sub-section (1) allows the Central Government to make such rules as may be

appear to be necessary or expedient for securing the defence of British India, public safety and so on; and if the Central Government is given power to make such rules it must also be deemed to be given the power to provide how its rules are to be interpreted, because the interpretation of the rules is at least as expedient or necessary for the defence of India as the rules themselves.

It is next argued on behalf of the accused that, assuming rule 3 to be intra vires, all that it does is to provide for an interpretation of the Rules; it does not provide for any interpretation of orders passed under the Rules, and here the question is the interpretation not of any one of the rules but of an order of delegation passed under the Rules. We agree that rule 3 cannot be deemed to provide for the interpretation of orders passed under the Rules as distinct from the interpretation of the Rules themselves. In the present instance what is being attacked is the basis of the order to the accused to present themselves before the District Superintendent of Police. When the basis of an order is attacked and the basis of the order is a rule, then in effect what is to be interpreted is the rule rather than the order itself, and in such a case rule 3 provides that the General Clauses Act must be the guide for the purposes of interpretation. In the present case however, the basis of the District Magistrate's order of the 6th September 1942, though in terms it refers to sub-rule (5B)(b), is really the order of delegation, since it is only by virtue of the powers delegated to the District Magistrate by the order of delegation that he is able to pass any orders at all. Ultimately then the question for consideration is the extent of the delegation; in other words what is to be interpreted is the order of delegation. The rules under which the powers were delegated is clear and there is no question of any interpretation of the rules which themselves were the basis of the order of delegation. What we are being asked to interpret is the order of delegation, and we are satisfied that rule 3 neither compels nor permits us to do so.

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the artificial provisions of the General Clauses Act for the purposes of the interpretation of that order. We cannot ignore the obvious distinction between the rules and orders passed under the rules.

But even if we were wrong in that respect, we should still find it impossible to apply sec.8(1) of the General Clauses Act to the order of delegation. It is true that in many respects the conditions underlying section 8(1) would have been fulfilled in these cases. By virtue of rule 3 the words " Defence of India Rules " could be substituted for the words " Central Act or Regulation " in sec.8(1) of the General Clauses Act; and although in terms sub-rule (5B) was not " repealed " by the amending order of the 15th August 1942, still that amending order in terms " substituted " the present sub-rule (5B)(a) and (b) for the old sub-rule(5B), which did not include the present item "(b)" at all. Although nothing is said about repealing the effect of substitution must, we think, be the same as the effect of a repeal followed by re-enactment with modification within the meaning of section 8(1). ^{we} ~~are~~ referred to Director of Public Prosecutions vs. Lamb (1941) 2 K.B. 89 for the proposition that an amendment does not amount to a repeal. But we think that there is a clear distinction between an amendment -- explicitor and an amendment which goes so far as to provide in ~~the~~ terms for the substitution of one rule for another. In the latter case we think that it is mere juggling with words to say that it does not amount to a repeal and re-enactment. But the difficulty in the way of the prosecution is that to bring the order of delegation within the provisions of section 8(1) of the General Clauses Act ^{they} must show that the order of delegation is an --- " instrument " within the meaning of that section, so that the reference to rule 26 in the order of the delegation can be interpreted as a reference to rule 26 as it might hereafter be re-enacted. We are not satisfied that the order of delegation can be

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concerned, and he must have the order served on the individual (i) personally or (ii) by post or (iii) (where he cannot be found) by leaving a copy of the order with some adult male member of his family or pasting a copy in a conspicuous part of his office or business. If that is done, rule 119 provides that the person concerned shall be deemed to have been duly informed of the order.

It is argued on behalf of the accused that the converse applies, so that a person in the case of whom this procedure has not been followed must be deemed not to have had notice of the order. We are unable to accept this argument. If in fact the individual concerned knew perfectly well that an order had been passed against him and acquired his knowledge by other means, then in our opinion it would be impossible to hold that he had not received notice of the order merely because notice was not given to him in the form prescribed by rule 119; yet that is the consequence that would follow if the argument were a valid argument. We think that the consequence of failure to carry out the provisions of rule 119 is practical rather than legal. The result would be that the prosecution would lose a simple method of establishing beyond controversy that the person affected had received notice of the order affecting him, and that the person affected would find it easier to establish the fact that he had not received notice, assuming that in any particular case the burden of proof were upon him to prove affirmatively that he had not received notice. It was argued also that rule 119 cannot apply to orders passed under r.26(5B)(b) because that rule provides for what is called a 'notified order' ---- in other words an order notified in the Bombay Government Gazette, and that failure to obey such an order carries with it immediate consequence -- irrespective of whether the person affected does in fact know

of the order or not. But in our view there is no justification for limiting the scope of rule 119 to orders other than -- notified orders. The rule simply says 'orders' and it --- presumably governs notified orders as well. We are however satisfied that the failure to follow the procedure ^rprescribed by rule 119 in the case of notified or unnotified orders alike carries with it no legal consequence; the utmost that it can do is to create practical difficulties in the way of the -- prosecution.

In the present case there is no evidence that the accused did in fact know of the orders to present themselves before the District Superintendent of Police; even the Police Patil of the village did not know of the order. Unless it ~~was~~ could be shown that the publication in the Bombay Government Gazette of an order addressed to an individual is sufficient notice to that individual, it would follow that there was ~~was~~ no evidence showing that the order had been brought to his notice, since admittedly in this case the provisions of rule 119 have not been followed. That being so the learned Judge was clearly right in directing the Jury that the accused were entitled to be acquitted on the ground that there was no -- evidence suggesting that they had knowledge or notice of the orders passed against them.

The result is that both the appeals fail. Whether the present trial is a bar under section 403 of the Criminal Procedure Code to a fresh trial on a charge of contravening the order of detention within the meaning of rule 26(6) read with rule 5 or under section 188 of the Indian Penal Code is a matter on which we do not feel called upon to express any opinion.

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Judgment recorded by the High Court in Criminal Appeal
No.426 of 1942(By the Government of the Province of Bombay)
in the case of Imperator v/s Veerupaxappa Balappa Hattargi.

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Mr.B.G.Rao, Government Pleader for the appellant.

Mr.L.P.Pendse, Advocate(appointed)for the accused.

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February
18th ~~January~~ 1943.

Coram:Beaumont C.J.and Weston J):-

Oral Judgment(per Beaumont C.J.) This is an appeal by
Government against an acquittal of the accused under sec.409
of the Penal Code. It is a very plain case.

The accused is a village postman, and on the
27th of October he was handed Rs.8/- and a money order
for that amount, and he had to pay the 8 rupees to a man
named Imamsaheb at the village of Lokoli which he was
visiting on the 31st of October 1941. On the 30th
of October the accused went to Belgaum on a cycle. He
says that he got the cycle from another postman named
Kundale, and that he handed Kundale the 8 rupees, ~~xx~~
I suppose, as security for his returning the cycle. At
Belgaum he was arrested by the police on suspicion of
having stolen the cycle. Then a postal Inspector got
hold of him, and asked him about the 8 rupees, which
he was unable to produce. Kundale denies that the money
was paid to him. At any rate, whether it was paid to
him or not, the accused was bound on the 31st of October
either to pay to Imamsaheb, the payee, or to return it
to the Post office. I have no doubt that the Post office
had a right to demand it back on the 30th, and they could
have entrusted the payment to some other postman.

The learned Magistrate found all the facts
against the accused, but he found that there was no
dishonest intention. I am quite unable to follow that, He
was to pay the money to the payee on the 31st, and
instead of that he misappropriated it. It seems to me a plain

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case, and we must convict him under sec.409 of the Penal Code, and sentence him to six months' rigorous imprisonment.

Per Weston J:- I agree.

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By the Court,

Sd/- H.G.Rao,
Deputy Registrar.

Submitted.

pp 45-47

A | The above judgment is put up for perusal. It may be shown to Secy H.D., ^{if desired,} and the result may be recorded. The judgment is a very old one but was ~~not~~ ^{recently} received from the S.P.H.C. only recently.

n.d.R.
2/11

A.L.R How did it happen that Govt was not informed of the result for over a year?

Office

H.G.H. 3/11

Submitted

It appears that through oversight S.P.'s office did not communicate the result. No reminder letter was

a'20, issued from this dept. requesting
G.P. to state whether the appeal
was decided. This appears to be
the only case where the result
was not communicated for a long
time.

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Criminal Appeal No. 425 of 1942.

Imperator vs. Veerupaxapa Balappa Hattarji.

Mr. B. G. Rao, Govt. pleader for the appellant.

Mr. L. P. Pandse Advocate (appointed) for the accused.

18th February 1943.

(Cram: Beamont C. J. and Weston J.)

Oral Judgment (per Beamont C.J.):- This is an appeal by Govt. against an acquittal of the accused under Sec. 409 of the Penal Code. It is a very plain case.

The accused is a village postman, and on the 27th of October he was handed Rs 8/- and a money order for that amount, and he had to pay the 8 Rs to a man named Imamsaheb at the village of Locoli which he was visiting on the 31st October 1941. On the 30th of October the accused went to Belgaum on a cycle. He says that he got the cycle from another postman named Kundale, and that he handed Kundale the 8 Rs, I suppose, as security for his returning the cycle. At Belgaum he was arrested by the Police on suspicion of having stolen the cycle. Then a postal Inspector got hold of him, and asked him about the 8/- Rs, which he was unable to produce. Kundale denies that the money was paid to him. At any rate, whether it was paid to him or not, the accused was bound on the 31st of October either to pay to Imamsaheb, the payee, or to return it to the Post office. I have no doubt that the post office had a right to demand it back on the 30th, and they could have entrusted the payment to some other postman.

The learned Magistrate found all the facts against the accused, but he found that there was no dishonest intention. I am quite unable to follow that. He was to pay the money to the payee on the 31st and instead of that he misappropriated it. It seems to me a plain case, and we must convict him under Sec. 409 of the Penal code, and sentence him to 6 months' rigorous imprisonment.

Per Weston J.:-

I agree.

" True copy - Original papers being of bad
quality - Destroyed."

K. Melankov

Superintendent,
D. Branch, Legal Department.